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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE METROPOLITAN WATER RECLAMATION DISTRICT OF GREATER CHICAGO IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

PAGE

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE METROPOLITAN WATER RECLAMATION DISTRICT AND A HOST OF OTHER UNITS OF LOCAL GOVERNMENT HAVE A SERIOUS NEED FOR COST RECOVERY RIGHTS 4

A. Cost recovery rights will enhance the abilities of a myriad of special purpose agencies and districts in the United States that own contaminated property to clean up that property 4

B. CERCLA's "Brownfield" reclamation programs, while helpful to the economy and environment generally, do not supplant or assuage the need for "cost recovery" rights for agencies owning contaminated land 7

II. DENIAL OF A COST RECOVERY RIGHT TO PRPS THAT VOLUNTARILY INCUR RESPONSE COSTS WOULD PERPETUATE ENVIRONMENTAL PROBLEMS AND SERVES NO WORTHY PUBLIC OR GOVERNMENTAL PURPOSE 9

A. Giving the United States and the States the sole power to control and approve the remediation of hazardous substance contamination unwisely and unnecessarily increases government power over a huge amount of troubled real estate nationwide 9

B. Sections 107 and 113 define two different causes of action with two disparate sets of fundamental elements that a successful plaintiff must prove 12

C. Any suggestion that voluntary cleanups are somehow "unsupervised"and therefore less worthy or suspect is contrary to actual practice 13

D. It would be folly to suppose that many prospective "innocent" Section 107 plaintiffs exist that will expend a lot of money on cleanups without a vested interest in a given property, such as the interests possessed by an owner 15

E. The United States' contention that settlement will be discouraged and enforcement impaired by the existence of a cost recovery right for PRPs that volunteer is unrealistic 16

III. THE SEVENTH CIRCUIT RECENTLY RULED IN A CORRECT AND CONVINCING MANNER ON THE QUESTION BEFORE THIS COURT 20

A. The United States' reading of the statute is ungrammatical and does violence to Section 107(a)(1)-(4) 21

B. Section 107 expressly allows "cost recovery" to be sought by "any other person," without limiting to non-PRPs the class of plaintiffs that fall within that broadest of phrases. No judicial deference to the United States' limited reading of "any" is required or appropriate. 22

C. Congress intended to encourage those involved with polluted sites to clean them up themselves rather than await government enforcement action ... 22

CONCLUSION 25

TABLE OF AUTHORITIES

Case Law PAGE(S)

Akzo Coatings Inc. v. Aigner Corp.,
30 F.3d 761 (7th Cir. 1994) 18

Atlantic Research Corp. v. United States,
459 F.3d 827 (8th Cir. 2006), cert. granted,
127 S.Ct. 1144 (2007) 15

Bedford Affiliates v. Sills,
156 F.3d 416 (2d Cir. 1998) 16

Browning Ferris Industries of Illinois, Inc. v. Ter Maat,
195 F.3d 953 (1999) 16

Consolidated Edison Co. of New York v. UGI Utilities, Inc.,
423 F.3d 90 (2d Cir. 2005) 12

Cooper Industries, Inc. v. Aviall Services Inc.,
543 U.S. 157 (2004) 22

FMC Corp. v. Aero Industries, Inc.,
998 F.2d 842 (1993) 23

Jones-Hamilton Co. v. Beazer Materials & Services, Inc.,
973 F.2d 688 (9th Cir. 1992) 6

Key Tronic Corp. v. U.S.,
511 U.S. 809, 114 S.Ct. 1960 (1994) 23

Metropolitan Water Reclamation Dist. v. North Am. Galvanizing & Coatings, Inc.,
473 F.3d 824 (7th Cir. 2007) 2, 20, 23-24

PMC, Inc. v. Sherwin-Williams Co.,
151 F.3d 610 (7th Cir. 1998) 16

United States v. Bestfoods,
524 U.S. 51 (1998) 5

United States v. Hercules, Inc.,
247 F.3d 706 (8th Cir.),
cert. denied 534 U.S. 1065 (2001) 6

United States v. Mead Corp.,
533 U.S. 218 (2001) 22

United States v. R.W. Meyer, Inc.,
932 F.2d 568 (6th Cir. 1991) 16

United States v. SCA Services of Indiana, Inc.,
827 F.Supp. 526 (N.D. Ind.1993) 17

United States v. USX Corp.,
68 F.3d 811 (3d Cir. 1995) 18

Statutes and Federal Regulations

Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"),
42 U.S.C. §§9601 et seq. ..... *passim*

Small Business Liability Relief and Brownfields Revitalization Act (Public Law 107-118) 7

Code of Federal Regulations, 40 C.F.R. Part 300
(http://www.epa.gov/oilspill/pdfs/40cfr300.pdf) 12

42 CFR § 300.430 14

42 CFR § 300.430(e)(9)(iii)(B) 14

42 CFR § 300.700(c)(3) 14

42 CFR § 300.700(c)(4) 14

42 CFR § 300.700(c)(6) 14

42 CFR § 300.915 14

70 ILCS 2605 1

Other Authorities

126 CONG. REC. 26,338 (1980) 23

126 CONG. REC. 30,932 (1980) 18

126 CONG. REC. 31,965 (1980) 18

BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (T. Davis ed. 2002), American Bar Association (ISBN 1-57073-961-7) 7, 15

EPA: APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS (http://www.epa.gov/superfund/action/guidance/remedy/arars.htm) 14

EPA: FINAL NATIONAL PRIORITIES LIST (NPL) SITES—BY STATE (March 2007), (http://www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm) 11

EPA: PROPOSAL GUIDELINES FOR BROWNFIELD S ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS (http://www.epa.gov/oswer/docs/grants/epa-oswer-obcr-07-01.pdf) 8

EPA: THE NEW BROWNFIELDS LAW (October 2002), EPA 500-F-02-134 (http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf) 7

EPA: SUPERFUND'S 25TH ANNIVERSARY: CAPTURING THE PAST, CHARTING THE FUTURE (http://www.epa.gov/superfund/25anniversary/index.htm) 11

GAO REPORT TO THE CHAIRMAN, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE: "SECURING WASTEWATER FACILITIES," GAO-06-390 . 4

GAO REPORT, SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, GAO/RCED-96-125 15

H.R. REP. NO. 96-1016(I) , 96th Cong., 2nd Sess. (1980), 1980 U.S.C.C.A.N. 6119, 1980 WL 12937 23

M. LESTER & L. BEASON, THE MCGRAW-HILL HANDBOOK OF ENGLISH GRAMMAR AND USAGE (2005) (ISBN 0-07-144133-6) 21

RESTATEMENT (SECOND) OF TORTS §886(A) 13

S. REP. 107-2, S. Rep. No. 2, 107th Cong., 1st Sess. (2001), 2001 WL 254419 11

INTEREST OF THE *AMICUS CURIAE*

The Metropolitan Water Reclamation District of Greater Chicago ("MWRD" or "*Amicus*") is one of the largest unified metropolitan sewerage and storm water control districts in the world.[1] It is a special purpose district that is a body corporate and politic and a unit of local government under Illinois law, principally as set forth in the Metropolitan Water Reclamation District Act, 70 ILCS 2605. It is governed by an elected Board of Commissioners.

With a budget for 2007 of approximately $1 billion, MWRD collects and treats wastewater from more than five million people and the industrial equivalent of an additional 4.5 million people in Cook County, Illinois. There are 129 municipalities and 30 townships within its territorial boundaries, including the City of Chicago. MWRD also provides stormwater management for all of Cook County. MWRD exercises regulatory control of discharges from industry and residential properties to its sewers and treatment system, imposes fees for use of the system, levies and collects taxes for its operations and maintenance, and may issue bonds for capital improvements needed for its operational purposes. It has the power of eminent domain.

MWRD is also the owner of more than twenty-five thousand acres of land, much of it lying along the banks of

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[1] *Amicus* respectfully submits that, as a local government entity, it is "similar" to those listed in Supreme Court Rule 37.4 and is thus permitted to file this brief without consent. However, out of courtesy and precaution, pursuant to Supreme Court Rule 37.3, *Amicus* also has obtained consent of the parties. Their letters of consent to this filing are being submitted to the Clerk of this Court simultaneously with this brief. Pursuant to Supreme Court Rule 37.6, *Amicus* avers that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the *Amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief.

waterways devoted to commerce and stormwater control. This land presents various environmental issues for MWRD. Some of it is used by MWRD, but uses of other MWRD-owned land range from parks, recreation and education to heavy industry. Over fifteen hundred acres owned by MWRD are leased to business and industry. In recent decades, standards for good environmental management have increasingly been incorporated in lease terms, but in some old leases still in effect the language and terms, while favorable to MWRD, are not fully satisfactory to assure that a tenant will be absolutely and fully responsive to environmental issues. Moreover, sometimes tenants can become financially unable to absorb the cost of clean-up. Third parties may contaminate its properties, as well.

When environmental contamination of any of its property occurs due to acts of others and there is either no tenant or no responsive or financially responsible tenant, any cleanup conducted by MWRD would require the expenditure of public funds. If MWRD cannot recoup those funds from an actively responsible party, the taxpaying public either pays the bill, or MWRD and the public are left with a blighted and sometimes vacated parcel.

MWRD has a very real and continuing interest in having the right to cost recovery under Section 107 of the Comprehensive Environmental Response and Liability Act (CERCLA), 42 U.S.C. §9607. Without such rights it may be unable to recover public funds it expends to clean up contaminated properties it owns or controls from the persons or parties that were directly responsible for the contamination. In addition, in *Metropolitan Water Reclamation District of Greater Chicago v. North American Galvanizing and Coatings, Inc.*, 473 F.3d 824 (7th Cir. 2007), the United States Court of Appeals for the Seventh Circuit recently ruled in MWRD's favor on essentially the same question presented in this case. The Seventh Circuit found that Section 107 provides this important cost recovery right to parties that voluntarily incur response costs.

SUMMARY OF ARGUMENT

Your *Amicus* and numerous other special purpose local government agencies own land that can become contaminated by acts of others. They have a real need for a right to recover the public monies they may spend to clean up these properties from those who actively polluted them. Unless a right to cost recovery is available, innocent taxpayers will wind up footing the cleanup bill on the many acres owned by public agencies that are deemed by the statute to be in the class of so-called "potentially responsible parties," or "PRPs."

The interpretation of Section 107 of CERCLA that the United States advances in favor of excluding "potentially responsible parties" from ability to gain cost recovery for clean-ups they undertake is contrary to the statute and serves no worthy public purpose. Denial of a cost recovery right to private and public PRPs who volunteer will decrease the number of properties that are properly addressed by remediation, and the concept that the "polluter pays" will not operate against non-volunteers except where there is a case of direct enforcement by the States or the United States.

The plain language of Section 107 creates a right of action for all "other persons" beyond the United States or a State, and supports no exclusion of entities like MWRD. The United States' interpretation of the language of Section 107 of CERCLA deserves no judicial deference. Moreover, it is ungrammatical and contrary to the express provisions and the remedial purposes of the law.

ARGUMENT

I. THE METROPOLITAN WATER RECLAMATION DISTRICT AND A HOST OF OTHER UNITS OF LOCAL GOVERNMENT NATIONALLY HAVE A SERIOUS NEED FOR COST RECOVERY RIGHTS.

A. Cost recovery rights will enhance the abilities of a myriad of special purpose agencies and districts in the United States that own contaminated property to clean up that property and reduce the burden on innocent taxpayers and site users.

There are thousands of publicly owned wastewater agencies like MWRD in this country. Each is charged with the collection, treatment, reclamation and discharge of wastewaters from residential, commercial and industrial sources throughout their respective jurisdictions. Roughly 200 million people, or 67 per cent of this country's population, are served by publicly owned treatment works. Their operations are financed by taxes, fees, federal government loans and bonds. As a rule, these agencies are hard-pressed to meet the demands for wastewater reclamation service. They are challenged by aging infrastructure, increasing regulatory requirements, security concerns (such as for chlorine tanks and storage) and population growth. Generally they are "under funded."[2]

In addition to wastewater agencies like MWRD, numerous other special purpose agencies of local government exist nationwide that cannot readily divest themselves of environmentally troubled properties. Included among such agencies that generally own real estate are airport authorities, port districts, exposition authorities, highway authorities, school districts, park districts, and public transit

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[2] See GAO REPORT TO THE CHAIRMAN, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, U.S. SENATE: "SECURING WASTEWATER FACILITIES," GAO-06-390 (p.5).

agencies. Many own properties that are used or occupied by parties other than the agency, and those parties can cause hazardous substances to be released in almost any way imaginable. Since by mere fact of "ownership" these agencies become "potentially responsible parties," they would be barred absolutely from relief under Section 107 if the United States' position in this case were to be accepted. In turn, unless they seek to have themselves sued by or otherwise resolve their liability with the United States or their state government, they would not even have a "contribution" remedy under CERCLA Section 113, 42 U.S.C. § 9613.

All of these agencies need cost recovery rights. The need for a claim for cost recovery under Section 107 arises for special purpose agencies in the obvious scenario where, as in the case recently decided by the Seventh Circuit in favor of your *Amicus*, there is a release of hazardous substances by a person other than the agency to lands owned by the agency. For wastewater agencies, there is the additional danger that unpermitted hazardous substances could be released into their collection systems, resulting in damage to their equipment and real property. While there may indeed be other common law and statutory remedies available to a specific plaintiff in a given situation, the ability to expend public funds and then get recovery from a "responsible party" would at least be useful, and in some cases may be the only way to get cleanup accomplished and obtain appropriate compensation.

While not every case or situation will present a financially capable defendant available and demonstrably "responsible," the reach of CERCLA responsibility extends beyond tenants or operators *per se* and includes (for example) a parent company whose "veil" may be pierced if shown to have abused the corporate form or that actively directs or causes polluting activities, (*Cf. United States v. Bestfoods*, 524 U.S. 51, 55 (1998)), as well as so-called "arrangers" of

hazardous substance releases, such as companies that contracted for chemical formulation or repackaging at a site. *Cf. United States v. Hercules, Inc.*, 247 F.3d 706 (8th Cir.), *cert. denied*, 534 U.S. 1065 (2001); *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.* 973 F.2d 688 (9th Cir. 1992). CERCLA cost recovery would also enable agencies like MWRD to sue those of its customers or midnight dumpers who release hazardous substances in unpermitted amounts into the MWRD collection system, where the release would cause broader environmental damage. Preserving this critical "reach" in the form of cost recovery rights for "private" parties, and especially tax-funded ones, could often determine whether a given site will be cleaned up anytime soon, if at all.

Public PRPs are spending the dollars of innocent taxpayers or site users whose fees are supposed to obtain public services. Unless public agencies have a cost recovery right, the burden of remediating dangerous sites will fall on innocent taxpayers or customers uninvolved with the pollution of those sites, the very group of persons that the Congress sought to free of liability on the principle of "the polluter pays." Thus the "equities" favor indemnity of such voluntary expenditures.

If accepted by the Court, the United States' reading of CERCLA would discourage voluntary responses and greatly reduce the number of instances in which "the polluter pays." The United States' position will greatly inhibit private cleanup generally and reduce the likelihood that polluters will pay for their actions, because the United States and the States generally use enforcement effort only at the most egregious sites.

B. CERCLA's "Brownfield" reclamation programs, while helpful to the economy and environment generally, do not supplant or assuage the need for "cost recovery" rights for agencies owning contaminated land.

In 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (P.L. 107-118). It amended CERCLA by expanding EPA's so-called "Brownfields" program, boosted funding for assessment and cleanup, enhanced roles for State and Tribal response programs, and clarified Superfund liability. A "Brownfield" property is "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[3]

As salutary as these revisions to CERCLA are, the "Catch 22" is that public agencies and others that already own troubled sites are *ipso facto* "potentially responsible parties" that cannot participate in the "Brownfields" grant process. Additionally, if a site has had operations on it that were subject to hazardous waste permits under the Resource Conservation and Recovery Act, or to certain Clean Air Act, Clean Water Act, or Toxic Substances Act permits, the site is ineligible.[4] The revised and expanded "Brownfields" programs thus miss an entire universe of PRPs, both public and private, by making them ineligible for grants or *bona fide* purchaser status. *See, e.g.*, 42 U.S.C. §9601(40).

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[3] See brochure published by EPA: THE NEW BROWNFIELDS LAW (October 2002), EPA 500-F-02-134 (http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf).

[4] See 42 U.S.C. §9601(39)(B), CERCLA Section 101(39)(B); see also *Update: Federal Legislation* at p. xxxv-liii, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (T. Davis ed. 2002), American Bar Association (ISBN 1-57073-961-7).

EPA has published guidance making this ineligibility clear. For example, it has advised grant applicants that:

> No part of a grant or loan can be used to pay response costs at a brownfield site for which the recipient of the grant or loan is potentially liable under CERCLA §107. *This means that applicants are not eligible for grants or loans at sites for which they are liable parties under CERCLA.* Under CERCLA § 107, current owners and operators of a facility, owners and operators of a facility at the time of disposal of a hazardous substance, parties that arranged for the treatment or disposal of hazardous substances, and parties that accepted hazardous substances for transport to disposal or treatment facilities are potentially liable for cleanup or paying the cost of cleaning up a site. Thus, an owner of contaminated land may be liable under CERCLA § 107 even though he/she did not cause or contribute to the contamination at the site.[5]

Thus, despite the adoption since the original enactment of CERCLA of generally beneficial programs that will shield new investors from liability (if they agree to a rigorous property cleanup), there is no relief for the existing landowner that voluntarily or involuntarily continues to own property contaminated by others.

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[5] EPA: PROPOSAL GUIDELINES FOR BROWNFIELDS ASSESSMENT, REVOLVING LOAN FUND, AND CLEANUP GRANTS (http://www.epa.gov/oswer/docs/grants/epa-oswer-obcr-07-01.pdf) (emphasis added).

II. DENIAL OF A COST RECOVERY RIGHT TO PRPS THAT VOLUNTARILY INCUR RESPONSE COSTS WOULD PERPETUATE ENVIRONMENTAL PROBLEMS AND SERVES NO WORTHY PUBLIC OR GOVERNMENTAL PURPOSE.

A. Giving the United States and the States the exclusive power to control and approve the remediation of hazardous substance contamination unwisely and unnecessarily increases government power over a huge amount of troubled real estate nationwide.

Inherent in the United States' argument is the sense that the only good cleanup is a government-supervised one.[6] If this position is accepted by this Court, the result will be an effective power grab utterly unintended by any language of the law. Because the possibility of enforcement action by the State or the United States against a contaminated property always exists, acceptance of the United States' position would effectively place a sort of tacit lien or question mark on thousands of acres of polluted real estate around the United States that could then only be cured by a governmental agency review and *imprimatur*. Indeed one almost gets the sense from the United States that persons rendered "potentially responsible parties" by the historic fact of passage of CERCLA are considered to be untrustworthy to undertake honest remediation work.

The United States does not really address the effect of its position on the private marketplace in its brief. It is difficult, indeed, to understand why the United States should care that an independent private right of action exists. The result of this Court's adopting the United States' position respecting the meaning of sections 107 and 113 would generally be to remove from the federal courts the

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[6] *See, e.g.*, negative reference to "unsupervised" cleanup, *Br. for United States* at 13.

jurisdiction and authority to hear and determine CERCLA suits for cost recovery by or contribution among private PRPs for the polluted condition of a site or facility, except in those relatively rare cases when that the United States, a State, an Indian Tribe, or a party not classifiable as a PRP gets actively involved with a site. Since a category of such plaintiffs that cannot be deemed PRPs is more to be wished for than real, only the highest priority sites are likely to be chosen by government regulators for future CERCLA remediation and enforcement.

Such a result would not only discourage voluntary proactive cleanups; it would also mean that many polluters will not be brought to court and forced to pay for the mess they have made. The result of the United States' reading would be that, in general, either a landowner finds it worthwhile to clean up a site at its own expense or the site sits in polluted condition, often unused, for years. Some landowners, would, no doubt, try to interest the EPA in pursuing PRPs other than themselves, but absent a critical public health threat at a given site, the likelihood of success in such an effort is small given the United States' limited resources for this program.[7]

Limiting claims to the circumstances described in Section 113(f), as the United States urges (*Br. for United States* at 26-32), will undercut CERCLA's essential purposes. PRPs would be motivated to wait until they have been sued, or

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[7] "Superfund faces constraints" is one of several statements that the EPA has published on its official Web Site concerning the Superfund program it conducts. "In Fiscal Year 2005, 50 percent of Superfund obligations for construction and post-construction activities went to 11 sites. . . . Due to EPA's priority to fund ongoing work, less funding was available for new construction projects, and EPA did not have enough resources to fund 9 new construction projects evaluated by the National Priority Panel and that were ready for construction." URL: http://www.epa.gov/superfund/action/process/numbers05.htm.

until they are able to negotiate a Section 113(f)(3)(B) settlement with the government (assuming they will ever be able to do so), before undertaking cleanup. Most importantly, PRPs at the vast majority of contaminated sites where there is no governmental suit or settlement will escape having to pay anything because there will no longer be a CERCLA mechanism to provide cost recovery to plaintiff PRPs who want to do the right thing and clean up.[8] The effect of this disincentive will be profound; of the hundreds of thousands of sites that are deemed contaminated, fewer than 1,300 are currently on the National Priorities list, and only around 300 have been addressed and removed from the list since the enactment of CERCLA over twenty-five years ago.[9]

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[8] As stated in the 2002 Senate Report on the so-called Brownfields amendments to CERCLA:

> "The vast majority of contaminated sites across the Nation will not be cleaned up by the Superfund program ..... [W]hile there are an estimated 450,000 brownfield sites, there are fewer than 1,300 NPL sites."

S. REP. 107-2, S. Rep. No. 2, 107th Cong., 1st Sess. 2001, at 15, 2001 WL 254419.

[9] USEPA's Web Site on the National Priorities List declares "1243 Sites as of March 20, 2007." FINAL NATIONAL PRIORITIES LIST (NPL) SITES—BY STATE (March 2007) (http://www.epa.gov/superfund/sites/query/queryhtm/nplfin.htm). According to EPA: "As of December 2005, construction work was complete at 966 or 62% of Superfund private and federal sites, and work was underway at an additional 422 sites." SUPERFUND'S 25TH ANNIVERSARY: CAPTURING THE PAST, CHARTING THE FUTURE (http://www.epa.gov/superfund/25anniversary/index.htm).

B. Sections 107 and 113 define different causes of action with differing sets of elements that a successful plaintiff must prove.

"Contribution" and "cost recovery" under CERCLA are in fact distinct causes of actions with different elements. Both Section 107 and Section 113 plaintiffs do have to prove the existence of a "facility" at which "hazardous substances" were released that create a harm or threat of harm, and that the defendant is responsible for the release and harm. The identity of the two causes of action ends there, however. A Section 107 plaintiff must also allege and prove that 1) it has made an expenditure that is an environmental response or remedial expenditure, and 2) that the expenditure and the action it paid for were "consistent with" the National Oil and Hazardous Substances Pollution Contingency Plan, 42 CFR, Subchapter J, Part 300 (known as the "National Contingency Plan" or "NCP"). But a Section 113 plaintiff need not make or prove *any* past expenditure whatsoever, much less any conformity with the NCP. Instead, it must prove 1) that it is either a qualified plaintiff, having either been sued or been the subject of an order, or that it has settled or otherwise resolved its liability to the United States or a State per Section 113(f), and 2) that it has incurred or will thereby incurred an obligation in excess of its equitable share if defendant is not made to contribute. Thus the issue of NCP "consistency" does not arise at all in a Section 113 case. Indeed, since the United States and the States bear the easier burden of showing only that their expenditures were "not inconsistent" with the NCP, it is possible for a Section 113 plaintiff to establish a defendant's liability for funds that were not expended strictly "by the book" in accordance with the NCP.

Given that the entire tort law premise of a contribution claim is that the party plaintiff seeking contribution has satisfied an obligation that is jointly an obligation of the party defendant, Section 107 rights cannot be equated to

"contribution" claims.[10] In the present case, the existence of the Plaintiff's obligation in fact and law to a state or to the United States is a mere surmise or assumption in the absence of either a section 107 judgment, a section 106 order, or eligible Section 113 settlement. It is not a judicially or administratively determined fact or legal liability. *Cf. Consolidated Edison Co. of New York v. UGI Utilities, Inc.*, 423 F.3d 90, 98 (n.8) (2d Cir. 2005); and also the Eighth Circuit in its opinion in this case (*Atlantic Research Corp. v. United States*, 459 F.3d 827, 831 (8th Cir. 2006), cert. granted, 127 S.Ct. 1144 (2007)).

C. Any suggestion that voluntary cleanups are somehow "unsupervised" and therefore less worthy or suspect is contrary to actual practice.

One might infer from the United States' Opening Brief that privately conducted remedial actions may generally be of poorer quality than those conducted under United States or state supervision. This notion smacks of arrogance and does not recognize what is required of a plaintiff to succeed in proving that its actions have been "consistent with the National Contingency Plan" under CERCLA Section 107(a) and 42 CFR § 300.700(c)(3). In actual practice, the requirement of consistency with the NCP mandates a sophisticated process that involves employment of well-qualified engineers, provision of both notice and opportunity for comment and, quite commonly, state agency review.

The NCP is no shrinking violet of a regulation. It fills 276 pages of the Code of Federal Regulations.[11] Its robust and

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[10] See RESTATEMENT (SECOND) OF TORTS, Section 886(A); accord *Metropolitan Water Reclamation District v. North American Galvanizing & Coatings*, 473 F3d 824, 836 n. 17 (7th Cir. 2007).

[11] The complete NCP text is available at:

(continued...)

serious nature is obvious from both its length and its detailed requirements respecting the process of carrying out a remedial action. The process a person seeking cost recovery must follow includes, *e.g.*, providing notice and the opportunity for comment at all critical stages of work, *see* 42 CFR § 300.700(c)(6), a remedial investigation that meets minimum standards and a feasibility study that compares various remedial options, *see* 42 CFR §§ 300.430 and 300.700(c)(4), compliance with all "applicable or relevant and appropriate regulations" (so-called "ARARs"), *see, e.g.*, 42 CFR § 300.430(e)(9)(iii)(B),[12] and the presentation of result data that satisfies extensive standards, *see* 42 CFR § 300.915.

As a practical matter, a great many private clean-ups are now being conducted under so-called "voluntary remediation" programs run by the States. These programs incorporate the key scientific and engineering elements of the NCP. This process of state review began under some state laws well over two decades ago, but its importance and use was increased by the amendments to CERCLA in 2002, which provided a degree of protection from enforcement to parties and sites that are enrolled in the state programs. Together with the adoption of risk-based assessment of alternatives and remediation goals, these programs offer promise of practical and relatively cost-effective cleanup approaches for landowners addressing their self-made problems and for "Brownfield" developers.[13]

(...continued)
http://www.epa.gov/oilspill/pdfs/40cfr300.pdf.

[12] See USEPA public explanation of ARARS at http://www.epa.gov/superfund/action/guidance/remedy/arars.htm. "ARARs are identified on a site-by-site basis for all on-site response actions where CERCLA authority is the basis for cleanup."

[13] A full explication of the NCP process and the State Voluntary
(continued...)

The state programs are available irrespective of whether "cost recovery" is going to be sought, and they do not themselves provide for "cost recovery." However, they are an excellent practical means of helping a Section 107 Plaintiff assure itself and the Court that its approach to a site is "consistent with the NCP," because they generally contain the needed elements of the NCP analysis and provide means of ratification of otherwise private engineering effort.

D. It would be folly to suppose that many prospective "innocent" Section 107 plaintiffs exist that will expend a lot of money on cleanups without a vested interest in a given property, such as the interests possessed by an owner.

The average CERCLA site cleanup cost as reported by GAO exceeded $26 million a decade ago.[14] This amount, which likely understates current costs, is hardly going to be collected by a typical local civic group. While there may be a community-minded organization or an environmentally conscious group here and there that has the willingness and capability to fund a given cleanup costing hundreds of thousands, if not millions, of dollars, such groups are pretty scarce. But the party with the most obvious vested interest in a property is the owner. In practice, landowners that have been involved in CERCLA actions brought by the government are generally not allocated more than a minor

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(...continued)
Cleanup programs would take too much text and time away from the issues before the Court. However, an excellent and pretty comprehensive study of the state programs is published in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY (T. Davis ed. 2002), American Bar Association (ISBN 1-57073-961-7).

[14] GAO REPORT, SUPERFUND: BARRIERS TO BROWNFIELD REDEVELOPMENT, GAO/RCED-96-125, at p. 3.

percentage of responsibility compared to active polluters. And, although there is no hard and fast rule, anecdotal experience with CERCLA cases over the last three or so decades suggests that, as a rule, landowners that are passive and do not reap significant economic benefits from the polluting activity are generally allocated a minority share of the cost of cleanup.[15] This is true for a number of reasons, but the basic reason is that it is an equitable result. As the Seventh Circuit has observed, "polluters differ in the blameworthiness of the decisions or omissions that led to the pollution, and blameworthiness is relevant to an equitable allocation of joint costs." *Browning Ferris Ind. of Ill., Inc. v. Ter Maat,* 195 F.3rd 953, 959 (7th Cir.1999), *cert. denied*, 529 U.S. 1098 (2000).

By contrast, where owners are significant actors and causes of the problem, they will get hit with as much as the entire allocation. In any event, the inherent equitable power of the trial court to fashion an equitable remedy and the ability of a defendant to counterclaim under Section 113 are fully adequate protection against unfair results from Section 107 cases.

E. The United States' contention that settlement will be discouraged and enforcement impaired by the existence of a cost recovery right for PRPS that volunteer is unrealistic.

The United States' position in its opening brief is that allowing PRPs a cost recovery right under section 107 would undermine or even "emasculate" the effectiveness of sections 113(f)(1) and 113(f)(3)(b). See *Br. for United States* at 30-31and 39-41. MWRD submits that these claims lack real world substance. Section 113(f)(3)(b) allows those who

[15] Examples of minor share cases would include *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998), *United States v. R.W. Meyer, Inc.*, 932 F.2d 56[illegible], 571-72 (6th Cir. 1991), and *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998).

settle with the Government to sue non-settlers. It seems elementary that nothing in this subsection would prohibit a suit by a settler against a volunteer PRP who remediates a site. Certainly that volunteer might answer with a counterclaim, but in the end, nothing inherent in the fact that a volunteer is a volunteer would prevent a fair allocation of responsibilities and costs. And Section 113(f)(1) allows PRP contribution suits "during or after" a section 106 or 107 action. Again, how does a volunteer's cleanup activity interfere with a PRP's right to sue?

Moreover, section 113(f)(2) provides that:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide . . .

This provision does not appear seriously to limit the United States and settling parties in determining what "matters" are "addressed" in a settlement agreement. Surely the United States is not suggesting that a court could be required to make a settling party pay more than what is fair if a volunteer PRP cleans up the site and sues that party. Indeed, District Courts have found it fair and appropriate to bar suits by non-settlers under such circumstances, recognizing the effect of the settlement. *See, e.g., United States v. SCA Services of Indiana, Inc.*, 827 F.Supp. 526 (N.D. Ind.1993). In any event, that is not the case before the Court.

If a PRP voluntarily expends funds for remedial action in a manner consistent with the NCP, that can only preserve the limited monies in the Superfund and elsewhere that might be used for another site. If that PRP in turn sues other PRPs for recovery of costs, those PRPs are hurt only

if the courts refuse to take into consideration whatever cooperation with or payments they may have already made in dealing with the United States. The latter notion assumes that courts will not see themselves as having equitable or common law power to be fair and give credit where credit is due. But that outcome is most unlikely given the courts' acknowledged powers to attend to the details of CERCLA liability in accordance with "traditional and evolving principles of common law." 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio); *see also, United States v. USX Corp.*, 68 F.3d 811, 824 (3d Cir. 1995).[16] But having common law principles govern the size of a cost recovery award is virtually meaningless if cost recovery rights are limited to only innocent parties in the first place. Indeed, since the United States' or State's response need only be proven "not inconsistent" with the NCP, while a private response must be proven "consistent" with the NCP, one has to wonder under what scenario the NCP, much less a court considering it under CERCLA, would allow some sort of double recovery. No situation comes to mind where this is likely.

The United States can bring overwhelming power to bear on private parties that it considers liable for CERCLA sites. It may order parties to do work at these sites under Section 106, and it may recover treble damage civil penalties for unreasonable refusals. And no rational party is going to dishonor a Section 106 order without being very confident it is an unlawful one; as the Seventh Circuit has observed, "[a] party served with a unilateral order under section 106 has little or no choice but to comply." *Akzo Coatings Inc. v.*

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[16] The resort to common law principles was not an idea limited to one chamber of Congress. In the Senate, the Hon. Jennings Randolph indicated plainly: "It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law." 126 Cong. Rec. 30,932 (1980).

Aigner Corp., 30 F.3d 761, 769 (7th Cir. 1994). Thus the situation hardly is one of weakness or lack of ability to work the sovereign's will. If a PRP acts as a renegade, could it not be ordered to desist from work in the right situation (assuming it even has a right to enter the site and do the remedy)? Could the United States not sue it along with other PRPs and force a hashing out of fair shares? The United States can do all these things and more. The United States may also sue parties under section 107, not only for future work but for past costs it has properly expended.

The United States' assertion that ability to achieve settlement will be undermined is fanciful. See, *e.g., Br. for United States* at 37-38. Section 113(f)(2) is not at all limited by its terms to the settlement of claims made under section 113. The scope of "matters covered" by a settlement under section 113 can include any renegade PRP, and it is unclear why the United States would not simply sue as a PRP every PRP it considers significantly responsible in the first place. For that matter, if the Court were to uphold a volunteer plaintiff's right of cost recovery under section 107 and also indicate that such a right of cost recovery is enforceable in practice in the manner of a "contribution" right or only to the extent of a defendant's just share, the "problem" the United States asserts would entirely disappear even as a abstract proposition, because all that any voluntary PRP plaintiff seeking cost recovery could ever expect to recover would be expenditures in excess of those reflecting its own fair share of the problem.

Additionally unconvincing is the United States' suggestion that allowing cost recovery actions under Section 107 would somehow "undermine" enforcement of Section 113. *Br. for United States* at 30. Indeed, the sections' respective limitations periods are triggered by different events, making the Congressionally-prescribed set of remedies and their limitations periods somewhat less seamless than the United States suggests. For contribution claims filed under

Section 113, the three-year limitation period set forth in Section 133(f) runs from a date certain, *i.e.*, either the date of the filing of initial suit against the PRP or the settlement date. But an action for removal cost recovery under Section 107 must, under Section 113(g)(2), be filed within three years of the completion of the removal action, and for remediation must be filed within six years of the initiation of a remedial action. But nothing about these differing limitations schemes, set forth within the same statutory section (Section 113), supports a restrictive reading of *who* may pursue one of the remedies so limited.

If Congress prescribed different elements for the two causes of action (contribution and cost recovery), why could it not prescribe different limitations periods for the two as well? Indeed, it is not hard to imagine why Congress would be more "generous" in prescribing limitations periods applicable to potential volunteer PRPs facing alone the difficult burdens of maintaining "consistency with the NCP" without the enforcement powers and expertise of the United States or a State (and, for many landowners including those like MWRD that are taxpayer-funded, without the ready resources as well).

III. THE SEVENTH CIRCUIT RECENTLY RULED IN A CORRECT AND CONVINCING MANNER ON THE QUESTION BEFORE THIS COURT

The United States attacks the Seventh Circuit's recent reading of Section 107(a) in the case it decided wherein *Amicus* is the plaintiff. See *Br. for United States* at 19, citing *Metropolitan Water Reclamation Dist. v. North Am. Galvanizing & Coatings, Inc.*, 433 F.3d 824 (7th Cir. 2007). Given this direct attack on MWRD's very own case, your *Amicus* will respectfully address a few of the points made by the Seventh Circuit in properly rejecting the position advanced in that court by the United States as *amicus curiae*.

A. The United States' reading of the statute is ungrammatical and does violence to Section 107(a)(1)-(4).

The United States concedes, as it must, that Section 107(a)(1)-(4)(B) provides a cause of action for cost recovery to "any other person" that incurs costs in responding. With this concession (which is plainly correct on the law) the issue of whether the *right* of cost recovery is "express" or "implied" becomes a proverbial "red herring." Were there not such a cause of action for "any other person," in clause B of Section 107(a)(1)-(4), there would be no grammatical sense in permitting the United States itself to bring cost recovery actions under clause (A) of the very same section of the statute.

The United States' suggested limitation on subsection 107(a)-(4)(B) plaintiffs stems from a reading that is not grammatical. The phrase "by any other person" is a prepositional phrase that is answering the question "who?", and it functions as a modified noun that identifies and distinguishes a class of plaintiffs in subsection (B) from a previous plaintiff class expressly denominated in the immediately antecedent subsection (A).[17] The result urged by the United States is a reading that would improperly amend the law through the use of bad grammar.

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[17] See, *e.g.*, M. LESTER & L. BEASON, THE MCGRAW-HILL HANDBOOK OF ENGLISH GRAMMAR AND USAGE (2005) (ISBN 0-07-144133-6) Chapter 2, at 23-24 and 37-38.

B. Section 107 expressly allows "cost recovery" to be sought by "any other person," without limiting to non-PRPs the class of plaintiffs that fall within that broadest of phrases. No judicial deference to the United States' limited reading of "any" is required or appropriate.

The basis of the Court's decision in *Cooper Industries, Inc. v. Aviall Services Inc.*, 543 U.S. 157, 166 (2004), was the straightforward "natural meaning" of the statute itself. Reading subsection 107(a)(1)-(4)(B) in the identical spirit demonstrates that the phrase "any other person" identifies a class of persons who may seek cost recovery under a distinct and more difficult standard of proof than the "persons" identified in the preceding subsection 107(a)(1)-(4)(A). The meaning of subsection (B) is thus plain: "any other person" than a just-specified subsection (A) plaintiff has the right of action and bears the burden of proof set forth in subsection (B). Any other meaning would be unnatural.

There are no fancy terms of art or environmental science involved in construing subsection 107(a)(1)-(4)(B). No agency rule or policy statement is involved. In fact, the issue has not been left to agency discretion in any manner. Deference to a government agency's interpretation of federal court jurisdiction is thus not appropriate in these circumstances. *See United States v. Mead Corp.*, 533 U.S. 218, 233-34 (2001).

C. Congress intended to encourage those involved with polluted sites to clean them up themselves rather than await government enforcement action.

CERCLA was meant to encourage "persons" involved with polluted sites to clean them up without invariably waiting for the Government to undertake a cleanup itself, issue a

cleanup order or file a lawsuit. The availability of a right to contribution was viewed as a major incentive to liable parties to undertake early cleanup action, with an understanding that a fair share of the response costs they incurred could be recovered from other responsible parties. *See, e.g.*, H.R. REP. NO. 96-1016(I), at 17 (1980), 1980 U.S.C.C.A.N. 6119, 6120, 1980 WL 12937. ("The legislation would also establish a federal cause of action . . . to induce such persons voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites"); 126 CONG. REC. 26,338 (1980) (remarks of Rep. Florio; CERCLA's liability scheme "creates a strong incentive both for prevention of releases and voluntary cleanup of releases by responsible parties"); *cf. Key Tronic Corp. v. United States*, 511 U.S. 809, 819 n.13 (1994) ("We recognize that CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others," quoting *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

The Seventh Circuit, in the case in which your *Amicus* was the appellee, correctly perceived that Congress' desire to encourage voluntary cleanup actions would be equally well served by holding that cost recovery rights are available to PRPs. After adopting the plain reading of Section 107 urged by MWRD, the court added:

> In addition, we are concerned that prohibiting suit by a voluntary plaintiff like [MWRD] may undermine CERCLA's twin aims of encouraging expeditious, voluntary environmental cleanups while holding responsible parties accountable for the response costs that their past activities induced. As *Consolidated Edison*, *Atlantic Research* and several post-*Cooper Industries* district court decisions have recognized, in order to further CERCLA's policies, potentially responsible parties must be allowed to

> recover response costs even before they have been sued themselves under CERCLA or have settled their CERCLA liability with a government entity. Were a cost recovery action unavailable in these circumstances, the Second Circuit reasoned, "such parties would likely wait until they are sued to commence cleaning up any site for which they are not exclusively responsible because of their inability to be reimbursed for cleanup expenditures in the absence of a suit." *Consol. Edison*, 423 F.3d at 100. As the [Second Circuit] concluded, this result "would undercut one of CERCLA's main goals, 'encourag[ing] private parties to assume the financial responsibility of cleanup costs by allowing them to seek recovery from others.'" Id. (quoting *Key Tronic*, 511 U.S. at 819 n.13 (internal quotation marks omitted)).

433 F.3d at 836.

The Seventh Circuit thus correctly rejected the forced reading of Section 107 advanced by the United States as inconsistent both with CERCLA's plain language and its animating legislative policies. The knowledge that such rights are available will, as in the case of MWRD, play a crucial role for any PRP, but especially for the many governmental entities that, like MWRD, own land used by others and depend on taxpayers to finance their operations and activities. Effectuation of both CERCLA's letter and spirit thus require that the decision below be affirmed.

CONCLUSION

Your *Amicus* respectfully submits that the statute speaks for itself on the legal question before the Court. Also, not only would the remedial and "polluter pays" principles of CERCLA be weakened considerably by adopting the United States' view of the law, but the resulting policy would be bad for the economy and the environment. The Court should affirm.

Respectfully submitted,

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